ADMINISTRATIVE APPEAL OF

SUNNY COVE DEVELOPMENT CORPORATION

v.

FLORA CRUZ, A/K/A FLORIDA PATENCIO, LESSOR

IBIA 74-12-A Decided August 27, 1974

Appeal from an administrative order canceling a lease.

Affirmed.

Indian Lands: Leases and Permits: Long-term Business: Cancellation

> A lease may be canceled by the Secretary, at the request of the lessor where lessee has failed to carry out specific provisions of the lease.

Indian Lands: Leases and Permits: Long terra Business: Rentals--Indian Lands: Leases and Permits: Long-term Business: Waiver--Indian Lands: Leases and Permits: Long-term Business--Waiver: Generally

Acceptance of rentals by the lessor subsequent to default on specific provisions of the lease by the lessee does not constitute waiver of the items in default in the absence of showing that the lessor voluntarily and intentionally waived the requirements under the lease.

APPEARANCES: Dillon, Boyd, Dougherty & Perrier, a professional corporation, for appellant, Sunny Cove Development Corporation, a California corporation; William N. Wirtz, Attorney at Law, Sacramento Regional Solicitor's Office, for the Area Director, Bureau of Indian Affairs, appellee.

OPINION BY ADMINISTRATIVE JUDGE WILSON

By special delegation of authority, the above-entitled matter directed to the Commissioner, Bureau of Indian Affairs, was transferred on July 27, 1973, by the Assistant to the Secretary for Indian Affairs to the Director, Office of Hearings and Appeals, under delegation of authority as dated August 6, 1973. The Director, by delegation of authority dated August 6, 1973, referred the matter to the Board of Indian Appeals for final determination. Copies of the above-mentioned delegation of authority were attached and made a part of the docketing notice of September 10, 1973.

The appeal of Sunny Cove Development Corporation is from the decision of the Area Director, Bureau of Indian Affairs, Sacramento, California, dated April 16, 1973, canceling a long-term business lease covering a portion of the original trust allotment of Santos Albert Patencio, Agua Caliente (Palm Springs), Allottee No. 12.

The lease in question identified as PSL No. 94, Contract 14-20-J50-1259, hereinafter referred to as lease, was executed by Sunny Cove Development Corporation, a California corporation, and Flora Cruz, also known as Florida Patencio, hereinafter referred to as lessor, on March 18, 1965. The Bureau of Indian Affairs, as trustee for the lessor, hereinafter referred to as Bureau, approved the lease for a period of twenty-five (25) years effective as of May 12, 1965.

The dispute focuses on Articles, 6, 7, and 8 of the lease. The lessor and the Bureau claim nonperformance of the Articles while the appellant claims waiver of performance.

Article 6, in its pertinent part, provides:

> 6. PLANS AND DESIGNS
>
> Within 180 days after the approval of this lease, the Lessee shall submit to the Secretary for approval, a general plan and architect's design for the complete development of the entire leased premises. Before beginning any construction whatsoever on the leased premises, the Lessee shall submit to the Secretary comprehensive plans and specifications for the improvements then proposed; the Secretary shall approve them if they

conform to the general development plan, but shall not thereby assume any responsibility whatever for detailed design of structure or structures or violation of any State, county or city law or ordinance. The Secretary shall either approve or state his reasons for disapproval of plans and specifications within thirty (30) days after receipt thereof from Lessee. No change will be made in plans or specifications after approval without the consent of the Secretary.

Article 7, in its pertinent part, provides:

7. IMPROVEMENTS

As a material part of the consideration of this lease, the Lessee covenants and agrees that within five (5) years after the beginning date of the term of this lease, Lessee will have completed construction of permanent improvements on the leased premises at a cost of and having a reasonable value of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

All buildings and improvements, excluding removable personal and trade fixtures, on the leased property shall remain on said property after the termination of this lease and shall thereupon become the property of the Lessor. The term 'removable personal property' as used in this Article shall not include property which normally would be attached or affixed to the buildings, improvements or land in such a way that it would become a part of the realty, regardless of whether such property is in fact so placed in or on or affixed or attached to the buildings, improvements or land in such a way as to legally retain the characteristics of personal property.

Lessee expressly waives the provision of Section 1013.5 of the California Civil Code pertaining to improvements affixed to the land by any person acting in good faith and erroneously believing because of a mistake either of law or fact that he has a right to do so, and also providing for removal of such improvements.

Article 8, in its pertinent part, provides:

8. COMPLETION OF DEVELOPMENT

The lessee shall complete the full improvement, development and construction on the leased premises in accordance with the general plan and architect's design,

> submitted in accordance with Article 6, Plans and Designs, above, within five (5) years from the beginning date of the term of the lease. If the Lessee fails to complete full improvement, development and construction within such period, the guaranteed minimum annual rental payable under this lease shall increase ten percent (10%) at the beginning of the next fiscal year of this lease. For each full fiscal year thereafter that the Lessee fails to complete such full improvement, development and construction, the guaranteed minimum annual rental payable under this lease shall be increased an additional two percent (2%).
>
> Whenever under this instrument a time is stated within which or by which original construction, repairs, or reconstruction of said improvements shall be completed and if during such period a general or sympathetic strike or lockout occurs, war or rebellion occurs or some other event which is unquestionably beyond Lessee's power to control occurs, the period of delay so caused shall be added to the period allowed herein for the completion of such work.

The lease covers about 4.29 acres which the appellant was required to fully develop and improve. To this end, Article 6 required the appellant to submit to the Secretary's representative in the Bureau a general plan and architect's design of the complete development of the entire leased premises within 180 days from the approval date of the lease.

According to the administrative files, the Bureau notified the appellant on several occasions that it was in default of Article 6 of the lease. In response thereto, the appellant did, during that time, submit a rough sketch plan of development. This plan was found unacceptable for approval by the Bureau. This apparently was the only plan for development of the leased premises ever submitted by the appellant to the Bureau.

Thereafter, the following chain of events appears to have taken place regarding the improvements. On July 5, 1966, appellant was notified by Frank Hamerschlag, Civil Engineer, that the property described in the lease did not coincide with a state highway and was in error in two other respects. Based upon Mr. Hamerschlag's survey, the Bureau thereafter prepared and furnished to appellant's attorney at that time, Mr. Raymond Simpson, a corrected legal description. Thereafter, on July 18, and 21, 1966, Mr. Simpson tendered to the appellant a supplemental agreement to correct the legal description. On January 19, 1967, the Bureau requested of appellant's attorney a status report on the proposed supplemental agreement. The Bureau on January 25, 1967, was advised by Mr. Simpson that appellant had requested a temporary suspension of the proposed supplemental agreement to allow time to obtain additional information and materials. The request was acknowledged on February 21, 1967, by the Bureau. On March 7, 1967, Mr. Simpson advised the Bureau that the supplemental agreement would be discussed with appellant's corporate president and that the Bureau would be advised of appellant's intention regarding the execution of the supplemental agreement.

Thereafter, on January 12, 1968, the appellant was issued a warning notice for defaults under the lease. The appellant's corporate president, in response thereto, on February 5, 1968, informed the Bureau that the appellant was taking curative action on the

listed defaults and that it needed additional time to prepare the plans and designs required by Article 6 of the lease.

Apparently, in the absence of any further developments, the Bureau on March 25, 1970, issued an Order to Show Cause Notice to appellant to show cause within 10 days thereof why the lease should not be canceled. The failure of the appellant to execute the supplemental agreement correcting the property description was brought to the attention of the appellant in the show cause letter. The Order to Show Cause Notice was acknowledged by appellant on March 25, 1970. At the request of the lessor, the lease cancellation proceedings were suspended.

On December 6, 1972, Mr. Simpson, appellant's attorney, requested that cancellation proceedings be initiated on the lease. The Bureau on January 5, 1973, served appellant with an Order to Show Cause why the lease should not be canceled. Appellant again requested negotiation. The request was denied and on January 13, 1973, the Bureau served on the appellant its 60 day notice of default on the lease. Thereafter, on April 16, 1973, the Bureau notified appellant that the lease was canceled as of that date.

It is from the foregoing decision that the appellant has appealed. The appellant in support thereof sets forth the following arguments as to why the lease should not be terminated or canceled:

1. The lease should not be forfeited because appellant is not in default of its obligation to submit a plan and design and complete construction of the improvements. Article 8 of the lease provides that the time periods for submission of plans and completion of improvements are extended if events occur which are beyond appellant's power to control.

2. The lease should not be forfeited, because the lessor, with notice of the alleged defaults of appellant, accepted rent, and continues to accept the rent, for several years after the alleged defaults occurred. Under California law this amounts to a waiver and precludes forfeiture of the lease.

The Board is not in agreement with appellant's first argument that its failure to perform under Articles 6, 7 and 8 were beyond its control due to (1) an incorrect description of the leased premises which the Bureau and the lessor refused to correct and (2) the demand of the County of Riverside that appellant bear the entire cost of providing flood control on the leased premises and abutting properties which did not justify the costs of such required improvements.

The record contrary to appellant's argument regarding the incorrect description indicates the Bureau and the lessor shortly after July 5, 1965, presented to the appellant an amendment to the lease to correct the description thereof. No reason has been given by the appellant as to why the supplemental agreement correcting the description of the lease premises was not executed by the appellant, notwithstanding the fact it had ample opportunity to do so.

The demands of Riverside County admittedly were beyond the control of the appellant. The requirement, however, did not present a condition which was impossible for the appellant to fulfill. The appellant, prior to entering into the lease, should have anticipated or should have known that the County would have certain requirements as a condition to the issuance of a use permit.

Regarding the foregoing arguments, the Board finds the arguments were not entirely beyond the control of the appellant and therefore did not preclude performance under Articles 6, 7 and 8 of the lease, and accordingly, an extension was not justified under Article 8.

Appellant's second contention or argument that lessor and the Bureau of Indian Affairs are estopped and precluded from canceling the lease because the acceptance of the rentals by the lessor after the period of time in which the appellant was to perform under Articles 6, 7 and 8 constituted a waiver of such default and that the appellant is discharged and forever excused from performing thereunder.

In this connection, the record indicates the appellant requested numerous extensions of time in which to cure the defaults under Articles 6, 7 and 8. These requests and the negotiations hereinabove mentioned that followed clearly led the Bureau of Indian Affairs and

the lessor to believe that appellant intended to carry out its commitments under Articles 6, 7 and 8. Moreover, the record indicates the Bureau and the lessor never at any time waived the requirements of Articles 6, 7 and 8. The record further indicates the parties were attempting to resolve their differences through negotiations right up to the time administrative action was commenced to terminate the lease.

The delay in instituting action to terminate the lease can only be attributed to the appellant's action or inaction. The Bureau and lessor, as the record indicates, in good faith relied upon the representation of the appellant that it intended to carry out its commitments as required by Articles 6, 7 and 8 of the lease. In reliance thereof, default proceedings were delayed and rentals collected for that period of time.

Estoppel against the Government should be invoked only in rare and unusual circumstances. It should be applied against the Government only in those cases where interests of justice clearly require it. The doctrine of estoppel must be applied with great caution to the Government and its officials. (31 C.J.S. Estoppel § 138); United States v. Gross, 451 F.2d 1355 (7th Cir. 1971).

In the case at bar, justice certainly would not be served if estoppel were invoked against the Government, particularly where as

the record indicates the appellant's action or inaction, not that of the Bureau and lessor, was instrumental in delaying default proceedings.

The general rule on estoppel in California was adopted in the case of Dolbeer v. Livingston, 100 Cal. 621, 35 P. 328 (1893), wherein it was stated:

> * * * "[W]here a person, by word or conduct, induces another to act on a belief in the existence of a certain state of facts, he will be estopped as against him, to allege a different state of facts" * * *. 'Estoppel in pais may be defined to be a right arising from acts, admissions, or conducts which have induced the change of position in accordance with the real or apparent intention of the party against whom they are alleged.' * * * "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, * * * ."

In light of Dolbeer v. Livingston, supra, the appellant due to its action or inaction in delaying default proceedings, is in no position to invoke the defense of estoppel.

Waiver, under the circumstances in this case, did not exist as neither the Bureau nor the lessor intended to waive the requirements of Articles 6, 7 and 8. A waiver is comprehensively defined as a voluntary intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed. (31 C.J.S. Estoppel § 61.)

In the case of Sessions, Inc. v. Morton, et al., 348 F. Supp. 694 (C.D. Cal. 1972); aff'd 491 F.2d 854 (9th Cir. 1974), the District Court under similar factual evidence as in the case at bar found that there was no waiver. The Circuit Court in sustaining the lower court's ruling in Sessions, supra, on waiver stated:

> * * * While it is a generally stated rule that the lessor's acceptance of rent after the lessee's breach implies a waiver of that breach, this concept, involving the knowing relinquishment of a right, is a matter of intent which necessarily depends on the factual circumstances of each case. Jose v. Iglesias, 462 F.2d 214, 216 (9th Cir. 1972): In re Wil-Low Cafeterias, Inc., 95 F.2d 306, 309 (2d Cir.) cert. denied, sub nom. Wil-Low Cafeterias, Inc. v. 650 Madison Avenue Corporation, 304 U.S. 657 (1938). * * *

Accordingly, under the foregoing circumstances, the appellant's arguments regarding estoppel and waiver of the requirements of Articles 6, 7 and 8 are untenable and without merit and the Board so finds.

The appellant's position and attitude regarding the requirements under Articles 6, 7 and 8 appears to be quite clearly set forth in the letter dated January 16, 1973, to the Bureau of Indian Affairs from appellant's former counsel, Philip M. Savage, III, of the law firm of Lonegeran, Jordan, Gresham and Varner, in the following words:

> As indicated in my prior letter, it is neither the desire nor the intention of Sunny Cove Development Corporation to only reinstate the existing lease even if the clauses concerning improvements are deemed to have

> been waived for all time. Rather, it is the intention and desire of the Sunny Cove Development Corporation to re-negotiate a new, long-term lease, under which it is economically possible to improve the premises as the Landlord desires and utilized [sic] the premises for the benefit of the Landlord and tenant.

The foregoing excerpt from its letter of January 16, 1973, indicates appellant never intended to carry out its commitments under Articles 6, 7 and 8 of the lease and was primarily interested only in renegotiating a new, long-term lease.

The appellant has shown no compelling reasons why the Area Director's decision of April 16, 1973, canceling the lease No. PSL-94 should not be affirmed. Accordingly, the Area Director's decision should be affirmed.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior (Section 211.13.7, Departmental Manual, December 14, 1973), the decision of the Area Director of April 16, 1973, canceling lease No. PSL-94 be, and the same is hereby AFFIRMED and the appellant's appeal is DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

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Alexander H. Wilson
Administrative Judge

I concur:

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Mitchell J. Sabagh
Administrative Judge